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**IN THE  
COURT OF APPEALS OF INDIANA**

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KEITH L. PREER, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0609-CR-528
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Jane Magnus-Stinson, Judge  
Cause No. 49G06-0111-PC-218889

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**May 7, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Keith L. Preer appeals his conviction for Burglary,<sup>1</sup> a class A felony, following his guilty plea to that charge. Specifically, Preer argues that the conviction must be vacated for the following reasons: (1) the conviction was barred under double jeopardy principles; (2) the trial court improperly injected itself into the plea negotiations; (3) his trial counsel was ineffective; and (4) the trial court was without jurisdiction to accept his guilty plea. Finding no error, we affirm the judgment of the trial court.

### FACTS

On November 17, 2001, a seven-year-old girl threw rocks at a passing truck that Preer was driving. Preer stopped his truck and began arguing with her. At some point, the girl's parents, Virginia Williams and David Ross, joined the argument. The argument escalated, and Ross struck Preer, knocking him to the ground. Sometime later, Preer, his cousin Kory Miller, and two other friends armed themselves with handguns and went to Williams's and Ross's home.

Preer and his companions stood in the doorway, brandished their handguns, and demanded that Ross come out of the house. Williams appeared at the door and told Preer "that there were children in the house and to let it go." Ex. p. 142. At that point, Preer or one of his accomplices shut the door and entered the residence after kicking in a side door. Preer and his friends began firing their handguns inside the house. Ross fired back, and a bullet struck Kory Miller, killing him.

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<sup>1</sup> Ind. Code § 35-43-2-1.

Preer was charged with felony murder, burglary as a class A felony, unlawful possession of a firearm by a serious violent felon, and carrying a handgun without a license on November 21, 2001. Thereafter, on July 16, 2002, Preer entered into a plea agreement whereby he would plead guilty to class A felony burglary. In exchange, the State agreed to dismiss the remaining charges. The agreement limited Preer's executed sentence to thirty years of incarceration. On August 16, 2002, Preer pleaded guilty and was sentenced to thirty years in the Department of Correction (DOC).

Two years later, on August 16, 2004, Preer filed a pro se petition for post-conviction relief arguing, among other things, that he did not voluntarily, intelligently, or knowingly plead guilty. After the post-conviction court heard arguments and testimony on July 28, 2006, it found that Preer's plea bargain specified that he would be convicted of burglary, a class A felony, and that serious bodily injury was an element of that offense. Appellant's App. p. 342-43. However, the post-conviction court determined that Preer was not adequately informed that serious bodily injury was an element of the offense when he pleaded guilty. Accordingly, the post-conviction court determined that there was a "strong probability that [Preer] did not know all the essential elements the State was required to prove to obtain a conviction," and that the post-conviction court could not "say beyond a reasonable doubt that the lack of notice was harmless." Id. at 345. As a result, the post-conviction court vacated Preer's plea and conviction, but rejected an additional claim that any further prosecution would violate the prohibition against double jeopardy.

Thereafter, the State filed a notice of appeal on September 20, 2006, with regard to the order on post-conviction relief. However, on September 25, 2006, the prosecutor again offered Preer another plea agreement with the original terms. Preer rejected the offer and demanded a reduced sentence with an extended probationary period. The State counter-offered, allowing Preer to plead guilty to burglary, a class A felony, with an executed sentence of thirty-five years in the DOC. The offer also provided for a ten-year suspended sentence and probation. The State further agreed that Preer would only be on formal probation for five of those years, and the last five years would be non-reporting.

Although Preer initially declined the counter-offer, the trial court—with all parties present and on the record—advised Preer that his position regarding a plea agreement was unreasonable, pointed out that he faced the possibility of convictions on all the original charges if he went to trial, and that his prior criminal record supported an enhanced sentence. Thereafter, the trial court recessed to allow Preer and his counsel to discuss the State’s offer. After court reconvened, Preer accepted the offer, pleaded guilty, and was sentenced pursuant to the terms of the plea agreement. The State then withdrew its Notice of Appeal on September 28, 2006. Preer now appeals, requesting that this court vacate his guilty plea and that the State cease all attempts to prosecute him.

## DISCUSSION AND DECISION

### I. Double Jeopardy

Preer first contends that the plea agreement must be set aside because the post-conviction court’s ruling on September 7, 2006 improperly “denied [him] relief from double

jeopardy and being re-tried.” Appellant’s Br. p. 5. In other words, Preer claims that “additional prosecution for his former Burglary conviction” was prohibited in light of double jeopardy principles. Id.

In resolving this issue, it is apparent that Preer is attempting to appeal the post-conviction court’s determination that double jeopardy principles do not prevent the State from subsequently pursuing the charges in this case. However, because Preer failed to appeal the post-conviction court’s ruling with regard to his double-jeopardy claims in 2006, his claim is waived. See State v. Erlewein, 755 N.E.2d 700, 704-05 (Ind. Ct. App. 2001) (holding that a double-jeopardy claim is waived if the defendant fails to make a timely objection to continued proceedings).

Waiver notwithstanding, this court has determined that if a guilty verdict has been set aside, a retrial of the defendant does not place him in multiple jeopardy. Rather, the retrial continues the same jeopardy that existed during the first trial. See Buggs v. State, 844 N.E.195, 200-01 (Ind. Ct. App. 2006) (observing that when a conviction is reversed, the original jeopardy continues upon retrial and does not give rise to the possibility of double jeopardy), trans. denied.

In this case, when Preer pleaded guilty on September 25, 2006, he had not been convicted or punished for any burglary because his 2002 conviction and sentence for that offense was vacated by the post-conviction court. Appellant’s App. p. 27. In essence, the post-conviction court merely continued Preer’s jeopardy on the charges that were originally

filed in 2002. As a result, it is apparent that Preer has been prosecuted, convicted, and sentenced for one crime in one criminal proceeding, and his double jeopardy claim fails.

## II. Trial Court's Conduct

Preer maintains that the plea agreement must be set aside because “the Court acting for the State negotiated the plea agreement.” Appellant’s Br. p. 36. In essence, Preer claims that the trial court’s remarks regarding the leniency of the proposed plea agreement denied him “the right to an impartial judge.” Id.

Once again, Preer is attempting to bring a claim of error that may only be brought by a petition for post-conviction relief. Challenges to the legality of a guilty plea and conviction are reviewable only through post-conviction relief. Crain v. State, 875 N.E.2d 446, 447 (Ind. Ct. App. 2007). The only exception to this rule occurs when a defendant has asked the trial court to withdraw the plea. He or she may then challenge the trial court’s denial of that request on direct appeal. Allen v. State, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007). Absent such a motion, a person who pleads guilty cannot challenge the propriety of a resulting conviction on direct appeal, because he or she is limited on direct appeal to contesting the merits of a trial court’s sentencing decision where the sentence is not fixed in the plea agreement. Starr v. State, 874 N.E.2d 1036, 1037 (Ind. Ct. App. 2007), trans. denied. In other words, “it is only a sentence—not the conviction itself—that may be challenged on direct appeal following a guilty plea.” Id.

In this case, Preer did not ask the trial court to withdraw his guilty plea. Appellant’s App. p. 26-29. Thus, Preer can only assert that the trial court’s actions regarding his plea

negotiations rendered his plea involuntary, unknowing, or unintelligent by way of a petition for post-conviction relief. Ellis v. State, 744 N.E.2d 425, 428 (Ind. 2001).

In any event, we note that Indiana trial court judges are permitted to participate in the parties' discussions about a plea. Id. at 429. More specifically, a trial judge may comment on a bargain or a proposal, which, in the court's opinion, is too harsh or too lenient. Id. And "rather than sending the parties away to guess again at what might pass muster in some judicial version of hide-the-ball," trial courts may indicate their inclination to accept or reject a position and propose alternative plea and sentencing options based on the court's knowledge of a presentence agreement. Id.

That is precisely what occurred here. Indeed, the trial court suggested that Preer's proposal of a reduced sentence and probation was too lenient given the offenses and his criminal history. As a result, the trial court recessed to allow Preer to consult with his counsel and others who were in the courtroom. Appellant's App. p. 131-32. Thereafter, Preer accepted the State's offer of a reduced prison term with an extended period of probation. Under these circumstances, we cannot say that the trial court improperly commented that Preer's proposed plea agreement was too lenient. See Ellis, 744 N.E.2d at 429-30 (observing that if a proposal falls outside the range of what the court regards as reasonable, it will be helpful to the parties to know whether the court found the proposal too lenient or too harsh, so that they may re-negotiate if both choose to do so). As a result, Preer's claim fails.

### III. Ineffective Assistance of Counsel

Preer next argues that his guilty plea must be set aside because his trial counsel was ineffective. Specifically, Preer claims, among other things, that his counsel stood “idle” while he was “coerced into pleading guilty.” Appellant’s Br. p. 44. Preer contends that his counsel did not ask him if he wanted to appeal, and she allowed him to receive a greater sentence than was warranted.

As noted above, challenges to the legality of a guilty plea are reviewable only by a petition for post-conviction relief. Crain, 875 N.E.2d at 447. And the only exception to this rule is for defendants who have asked the trial court to withdraw their plea and who may therefore challenge the trial court’s denial of their request on direct appeal. Allen, 865 N.E.2d at 689. Absent such a motion, a person who pleads guilty cannot challenge the propriety of any resulting convictions on direct appeal; he or she is limited on direct appeal to contesting the merits of a trial court’s sentencing decision where the sentence is not fixed in the plea agreement. Starr, 874 N.E.2d at 1037. And this rule applies to claims of ineffective assistance of counsel. Collins v. State, 676 N.E.2d 741, 743 (Ind. Ct. App. 1996). Under these circumstances, Preer’s claims of ineffective assistance of counsel are waived.

Waiver notwithstanding, we note that if Preer is to prevail on his ineffective assistance of counsel claim, he must demonstrate that his counsel’s performance was so deficient that she was not functioning as counsel guaranteed by the Sixth Amendment. McCarty v. State, 802 N.E.2d 959, 965 (Ind. Ct. App. 2004). Moreover, Preer must establish that he was prejudiced as a result of that deficient performance. Id. The performance of counsel is presumed to be effective, and Preer must offer strong and convincing evidence to overcome



that presumption. Id. This court's inquiry "focuses on the attorney's actions while remembering that 'isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.'" State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007) (quoting Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001)). Preer can establish prejudice sufficient to overturn a trial result due to ineffective assistance only if he shows there is a reasonable probability that, but for any unprofessional errors, the result of the proceeding would have been different. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A reasonable probability exists if there is a probability sufficient to undermine confidence in the outcome of the proceeding. Id.

In support of his contention that his trial counsel was ineffective, Preer asserts the following:

[Preer] has presented evidence that at the time he entered the second plea agreement he was aware of his counsel's alleged deficiencies his case. [sic] As such, he asked for a jury trial this time. [Preer] was never given by the Post-Conviction Rules his twenty days to accept the old plea or face a greater sentence. The attorney stood by and allowed him to receive a greater sentence without [protecting] his statutory right.

Appellant's Br. p. 45.

Despite these contentions, nothing in the record supports Preer's claim that he requested a jury trial because of an alleged belief that counsel was improperly representing him during the plea negotiations. To the contrary, the record shows that Preer willingly engaged in plea negotiations with the State, exchanging offers and counter-offers before and during the September 25, 2006, hearing. Ex. 128, 131-32, 134-35, 145-46. During that exchange, Preer demanded a different plea agreement with a shorter sentence and a greater

term of probation. Appellant's App. p. 353. Moreover, unlike the terms of incarceration that were set forth in the original plea agreement, Preer's counsel allowed negotiations that resulted in the State's offer of a five-year reduction in the executed portion of Preer's sentence together with a ten-year term of probation, with the second half of that probation to be unsupervised. Id. In our view, Preer's counsel's performance was well within the minimum standard set by the Sixth Amendment. Therefore, Preer's claim of ineffective assistance of counsel fails.

#### IV. Trial Court's Jurisdiction

Finally, Preer contends that the plea agreement must be set aside because the trial court lacked jurisdiction in this cause. In support of his claim, Preer asserts that a trial court "does not have jurisdiction to continue with a case concerning matters from which an appeal is taken as long as that appeal is pending." Appellant's Br. p. 48.

We initially observe that trial courts have three types of jurisdiction: subject matter jurisdiction, jurisdiction of the person, and jurisdiction over the case. Kondamuri v. Kondamuri, 799 N.E.2d 1153, 1156 (Ind. Ct. App. 2003). Subject matter jurisdiction is the "general scope of authority conferred on the court by the Indiana Constitution or by statute." Id. The absence of subject matter jurisdiction makes a trial court's orders void when entered; claims that a trial court acted without subject-matter jurisdiction cannot be waived and orders made without such jurisdiction may be attacked at any time. Twyman v. State, 459 N.E.2d 705, 707 (Ind. 1984).

Preer does not claim that the Marion Superior Court is without power to hear criminal cases. Rather, Preer's contention is that the trial court did not have jurisdiction over him or jurisdiction to enter judgment of conviction and sentence in his case. Jurisdiction over the case "refers to a trial court's right, authority, and power to hear and decide a specific case within the class of cases over which a court has subject matter jurisdiction." Kondamuri, 799 N.E.2d at 1156. Similarly, jurisdiction of the person "refers to the particular parties who are brought before the court, and the right of that particular court to exercise jurisdiction over those parties." Twyman, 459 N.E.2d at 707. Judgments entered in the absence of either of these types of jurisdiction are merely voidable, and a timely objection is required to preserve a challenge to the lack of personal jurisdiction or jurisdiction over the case. Id. Thus, the lack of personal jurisdiction or jurisdiction over the case can be waived. M.B. v. State, 815 N.E.2d 210, 213 (Ind. Ct. App. 2004).

In this case, Preer did not challenge the trial court's alleged lack of personal jurisdiction or jurisdiction over his case. Thus, he has waived his challenge to the trial court's acceptance of his plea and the trial court's sentencing order. Twyman, 459 N.E.2d at 707. Moreover, Preer pleaded guilty, and that plea provided him with a substantial benefit. In light of his plea of guilty, Preer submitted to the jurisdiction of the trial court and he waived the right to object to an alleged lack of personal jurisdiction or jurisdiction over the case. See Alexander v. State, 514 N.E.2d 292, 293 (Ind. 1987) (holding that the defendant's jurisdictional claim was waived because the defendant submitted to the court's jurisdiction by pleading guilty).

Finally, even assuming that Preer had not waived his jurisdictional challenge, he does not prevail. Trial courts only lose jurisdiction over a case when an appeal from a final judgment has been perfected. Schumacher v. Radiomaha, Inc., 619 N.E.2d 271, 273 (Ind. 1993). In accordance with Indiana Appellate Rule 8, the trial court loses jurisdiction and jurisdiction is then transferred to the Supreme Court or Court of Appeals, as the case may be, when the trial court clerk issues a Notice of Completion of Clerk's Record (Notice). Here, the trial court clerk did not issue a Notice at any time after the prosecutor filed a Notice of Appeal from the trial court's grant of post-conviction relief. Appellant's App. p. 27-28. Therefore, the trial court had not lost jurisdiction when it accepted Preer's guilty plea and sentenced him according to the plea agreement. For all of these reasons, Preer's jurisdictional challenge fails.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.